

ORIGINAL
FILE

RECEIVED

JUL 29 1992

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Federal Communications Commission
Office of the Secretary

In re Applications of)	MM DOCKET NO. 92-121
)	
ROSAMOND RADIO, INC.)	File No. BPH-910225MG
)	
JAMIE LEIGH COBERLY)	File No. BPH-910225MH
)	
DIANE K. HITT)	File No. BPH-910225MI
)	
For a Construction Permit for a)	
New FM Station on Channel 228A at)	
Rosamond, California)	

To: Administrative Law Judge
Joseph P. Gonzalez

MASS MEDIA BUREAU'S CONSOLIDATED COMMENTS ON
JOINT PETITIONS FOR APPROVAL OF SETTLEMENT AGREEMENTS,
PETITION FOR LEAVE TO AMEND, and
MOTION FOR DELETION OF ISSUE

1. Before the Presiding Judge are: (a) a Joint Request for Approval of Settlement Agreement ("Joint Request One"), filed July 11, 1992, by Rosamond Radio, Inc. ("RRI") and Diane K. Hitt ("Hitt"); (b) a Joint Request for Approval of Settlement Agreement ("Joint Request Two"), filed July 11, 1992, by RRI and Jamie Leigh Coberly ("Coberly"); (c) a Petition for Leave to Amend, filed July 15, 1992, by RRI; (d) a Joint Request for Deletion of Issue, filed July 20, 1992, by RRI, Coberly, and Hitt; and (e) an Erratum to Joint Request for Deletion of Issue, filed July 21, 1992, by RRI, Coberly, and Hitt. The Mass Media Bureau submits the following consolidated comments.

No. of Copies rec'd
List A B C D E

0+6

2. Joint Request One is accompanied by a settlement agreement which contemplates the dismissal of Hitt's application. In consideration for the dismissal of her application, RRI proposes to pay Hitt the sum of \$20,879.42, which amount represents Hitt's legitimate and prudent expenses incurred in preparing and prosecuting her application. Hitt provides documentation in support of these expenses.

3. Hitt and a principal of RRI state that the settlement agreement would serve the public interest by hastening the earlier institution of a new FM radio service in Rosamond, California. Both also declare that their respective applications were not filed for the purpose of reaching or carrying out a settlement.

4. Joint Request Two is accompanied by a settlement agreement which contemplates a merger of Coberly and RRI. Specifically, Coberly proposes to dismiss her application in consideration for an ownership interest in a new corporate entity to be formed by RRI. RRI proposes, pursuant to § 1.65 of the Commission's Rules, to amend its application to specify a new corporate entity, d/b/a Waremar Communications, Inc. ("Waremar"). The current shareholders of RRI will hold 80% of the equity in Waremar, all in the form of voting stock. Coberly will hold 20% of the equity in the proposed corporate permittee, 15% of which in the form of voting stock and the remaining 5% in the form of

nonvoting shares. RRI also proposes in its amendment to withdraw its prior commitment to divest all interests in Station KUTY(AM), Palmdale, California.

5. Coberly and a principal of RRI state that the settlement agreement would serve the public interest by hastening the earlier institution of a new FM radio service in Rosamond, California. Both also declare that their respective applications were not filed for the purpose of reaching or carrying out a settlement.

6. RRI, Coberly, and Hitt seek deletion of a city-coverage issue specified in the Hearing Designation Order, DA 92-640 (released June 11, 1992) ("HDO"), at ¶¶ 4-5, 12(1). In support, the applicants argue that (a) the issue was added as the result of a predesignation objection filed by Hitt against Coberly's technical proposal, not RRI's technical proposal; (b) the three mutually exclusive applicants have reached a universal accord whereby RRI's technical proposal will be the prevailing proposal; (c) Rosamond is a United States Census designated place with no specific legal boundaries; and (d) RRI's 70 dBu signal will cover more than 80% of the residential area of Rosamond¹ regardless of whether the boundaries of Rosamond are defined by the Rosamond Water and Sewer Districts (RRI's proposal), the United States Census Designated Boundaries (Coberly's proposal),

¹ See John R. Hughes, 50 Fed. Reg. 5679 (1985).

or the United States Post Office service area (Hitt's proposal).

7. The Bureau submits that Joint Request One and Joint Request Two satisfy the requirements of § 73.3525 of the Commission's Rules, which implements § 311(c)(3) of the Communications Act of 1934, as amended. Specifically, copies of the settlement agreements have been timely filed, and the applicants have established that approval of the agreements would serve the public interest and that none of the applications was filed for an improper purpose. Additionally, Hitt has demonstrated that the monetary consideration that she will receive does not exceed her legitimate and prudent expenses. See Settlement Agreements, 6 FCC Rcd 85 (1990), modified, 6 FCC Rcd 2901 (1991).

8. RRI states that its Petition for Leave to Amend is being filed pursuant to § 1.65 of the Commission's Rules. By its amendment, RRI proposes to alter the corporate composition and structure of the proposed surviving applicant in this proceeding. Thus, the amendment should have been accompanied by an appropriate "good cause" showing, pursuant to § 73.3522 of the Commission's Rules. Nevertheless, the Bureau submits that there is good cause to accept the amendment, inasmuch as it is an integral part of the universal settlement package and will facilitate the early inauguration of new FM service in Rosamond.

9. The Bureau further submits that the applicants' joint request for deletion of the city-coverage issue specified against RRI is more akin to a motion for summary decision. Indeed, the test for deletion of an issue is entirely different than the test for summary decision of one. Deletion of a particular issue is warranted when the moving party demonstrates that the issue was added in error. Muncie Broadcasting Corp., 89 FCC 2d 123 (Rev. Bd. 1982); Midwest St. Louis, Inc., 63 FCC 2d 262 (Rev. Bd. 1976); Centreville Broadcasting, 21 FCC 2d 216 (Rev. Bd. 1971). By contrast, § 1.251 of the Commission's Rules provides for summary decision when there is no genuine issue of material fact for determination at hearing.

10. In the instant case, the applicants have not shown that the city-coverage issue was specified in error against RRI. At the time of designation, each of the three mutually exclusive applicants was relying on different interpretations of the boundaries of Rosamond in order to assert compliance with the Commission's city-coverage requirements. The Commission specified a city-coverage issue against all of the applicants because:

[d]eterminations of substantial compliance and accurate measurements cannot be made where applicants are basing their coverage predictions on inconsistent assessments of the city's boundaries. In order to properly evaluate each applicant's proposal, the Commission must examine the applications and their assertions from a standardized frame of reference.

HDO, at ¶ 5.

11. Since the Commission was justified in specifying the city coverage issue against RRI (as well as the other applicants), the issue was not specified in error. Accordingly, deletion is not warranted.

12. Nevertheless, based on the information provided by the applicants, the Bureau submits that summary decision in RRI's favor of the city-coverage issue is justified. Because Coberly and Hitt are dismissing their applications pursuant to a universal settlement, RRI's interpretation of the boundaries of Rosamond now constitutes the only frame of reference for determining compliance with the Commission city-coverage requirements. That interpretation, based on the city's Water and Sewer Districts, is, in the Bureau's opinion, reasonable. Moreover, even if either of the other interpretations proffered by Coberly and Hitt represented the appropriate frame of reference by which to determine compliance, the applicants have shown that RRI would still satisfy the Commission's city-coverage requirements. Accordingly, since there is no genuine issue of material fact for determination at hearing, summary decision in RRI's favor of the city-coverage issue is justified.

13. Finally, RRI should be permitted to withdraw its prior commitment to divest all interests in Station KUTY(AM), Palmdale, California. Such a withdrawal is consistent with Reform of Comparative Hearing Process, 6 FCC Rcd 157, 159-160 (1990),

recon. granted in part, 6 FCC Rcd 3403, 3403 (1991).

14. Based on the foregoing, Joint Request One and Joint Request Two should be granted; the settlement agreements should be approved; the Hitt and Coberly applications should be dismissed with prejudice, with Hitt entitled to reimbursement totalling \$20,879.42; RRI's amendment should be accepted; summary decision of the city-coverage issue specified against RRI should be granted in RRI's favor; and RRI's amended application (substituting Waremar Communications, Inc. as the surviving applicant) should be granted.

Respectfully submitted,
Roy J. Stewart
Chief, Mass Media Bureau



Charles E. Dziedzic
Chief, Hearing Branch



Gary P. Schonman
Attorney
Mass Media Bureau

Federal Communications Commission
2025 M Street, N.W., Suite 7212
Washington, D.C. 20554
(202) 632-6402

July 29, 1992

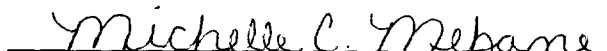
CERTIFICATE OF SERVICE

I, Michelle C. Mebane, a secretary in the Hearing Branch, Mass Media Bureau, certify that I have, on this 29th day of July 1992, sent by regular United States mail, U.S. Government frank, copies of the foregoing "Mass Media Bureau's Consolidated Comments on Joint Requests for Approval of Settlement Agreements, Petition for Leave to Amend, and Motion for Deletion of Issue" to:

Susan A. Marshall, Esq.
Arent, Fox, Kintner, Plotkin & Kahn
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5339
Counsel for Rosamond Radio, Inc.

John F. Garziglia, Esq.
Pepper & Corazzini
1776 K Street, N.W., Suite 200
Washington, D.C. 20006
Counsel for Diane K. Hitt

Arthur Belendiuk, Esq.
Smithwick & Belendiuk
1990 M Street, N.W.
Washington, D.C. 20036
Counsel for Jamie Leigh Coberly


Michelle C. Mebane